STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALEX LAVERN GOLDMAN,

Defendant-Appellant.

UNPUBLISHED
August 28, 2007

No. 268842
Kalamazoo Circuit Court
LC No. 05-000086-FC

Before: Bandstra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of felony murder, MCL 750.316(1)(b); armed robbery, MCL 750.529; conspiracy to commit armed robbery, MCL 750.157a; and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm defendant's convictions, but vacate that portion of the judgment of sentence requiring defendant to reimburse the county for his legal fees, and remand to the trial court for reconsideration of this issue in light of *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004).

Defendant first argues that defense counsel's failure to respond to the prosecutor's interlocutory application for leave to appeal, which resulted in the reversal of the trial court's denial of the prosecutor's request to exercise a peremptory challenge, constitutes structural error requiring automatic reversal under *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Plaintiff argues that defense counsel's actions should be reviewed under the two-part standard for evaluating claims of ineffective assistance of counsel set out in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and that under that standard, reversal is not required.

Defendant failed to move for a new trial or a *Ginther*[1] hearing below; therefore, this issue is unpreserved and our review is limited to the appellate record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

The Sixth Amendment provides defendants with the right to counsel at all critical stages of the criminal process. *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004); US Const, Am VI; Const 1963, art 1, § 20. The Sixth Amendment right to counsel is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Gideon v Wainwright*, 372 US 335, 342-344; 83 S Ct 792; 9 L Ed 2d 799 (1963); US Const XIV. "It is well established that a total or complete deprivation of the right to counsel at a critical stage of a criminal proceeding is a structural error requiring automatic reversal." *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005), citing *Cronic*, *supra* at 659 n 25 ("The United States Supreme Court has 'uniformly found constitutional error without any showing of prejudice when counsel was . . . totally absent . . . during a critical stage of the proceeding.'"); *People v Anderson (After Remand)*, 446 Mich 392, 405; 521 NW2d 538 (1994), citing *Gideon*, *supra*; *People v Russell*, 471 Mich 182, 194 n 29; 684 NW2d 745 (2004), citing *Gideon*, *supra*, and *People v Duncan*, 462 Mich 47, 51-52; 610 NW2d 531 (2002) ("The complete denial of counsel at a critical stage of a criminal proceeding is a structural error that renders the result unreliable, thus requiring automatic reversal.").

"A critical stage is one where potential substantial prejudice to defendant's rights inheres in the particular confrontation and where counsel's abilities can help avoid that prejudice." *Thomas v O'Leary*, 856 F2d 1011, 1014 (CA 7, 1988), citing *Coleman v Alabama*, 399 US 1, 9; 90 S Ct 1999; 26 L Ed 2d 387 (1990). "Such confrontations include, for example, the indictment, arraignment, and preliminary hearing, *Kirby v Illinois*, 406 US 682, 689[;] 92 S Ct 1877, 1882[;] 32 L Ed 2d 411 (1972), and sentencing. *Strickland v Washington*, 466 US 668, 686[;] 104 S Ct 2052, 2063[;] 80 L Ed 2d 674 (1984)." *Id*. We find that the prosecutor's emergency interlocutory appeal from the trial court's ruling constituted a critical stage of the criminal proceeding. See *Fields v Bagley*, 275 F3d 478, 484 (CA 6, 2001), and *Thomas*, *supra* at 1014-1015.

We conclude, however, that defendant was not totally denied counsel at that stage of the proceedings so as to constitute a structural error requiring automatic reversal. Here, defense counsel was not totally absent during a critical stage of the proceeding. Defense counsel was served with a copy of the prosecution's emergency interlocutory appeal, was informed by this Court of a deadline in which to respond, and timely informed this Court that an answer would not be filed. Although there was a basis upon which defense counsel could have responded to the prosecutor's appeal (by making the arguments he made before the trial court), any argument defense counsel made concerning the *Batson*[2] issue would not have been successful. See *People v Goldman*, unpublished order of the Court of Appeals, entered December 9, 2005 (Docket No. 266992). The trial judge erred in sustaining defendant's *Batson* challenge, and this Court properly granted the prosecutor's motion for peremptory reversal and remanded for the trial judge to excuse the challenged juror. *Id*.

Defendant points to MCR 6.005(H)(3) and MRPC 1.3 to support his argument that the facts of this case evidence a complete denial of counsel at a critical stage of the proceedings. MCR 6.005(H)(3) provides that "[t]he responsibilities of the trial lawyer appointed to represent

[2] *Batson v Kentucky*, 476 US 79; 106 S Cr 1712; 90 L Ed 2d 69 (1986).

the defendant include . . . responding to any preconviction appeals by the prosecutor." MRPC 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client," and the comment to the rule provides that "[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer . . . ." In regard to MRPC 1.3, defense counsel was required to, and did, act with reasonable diligence and promptness in representing defendant: he informed this Court that no answer would be filed before the time that an answer was due, and continued to act as defense counsel at trial. His choice to not file a brief was conscious, and given the merits of the issue, was an objectively reasonable strategic decision. In regard to MCR 6.005(H)(3), our Supreme Court, in its grant of leave in *People v Murphy (On Reconsideration)*, unpublished opinion per curiam of the Court of Appeals, issued October 12, 2006 (Docket No. 258397), specifically directed this Court, "in all cases involving preconviction appeals by the prosecution, to inform defense counsel in writing that they must file a timely response to the application." *People v Murphy*, 477 Mich 1019; 726 NW2d 722 (2007). However, this directive was not in effect at the time of the prosecution's appeal in this case, and although defense counsel had a responsibility to respond to the appeal, it does not necessarily follow that declining to respond constituted a structural error requiring automatic reversal: rather, the circumstances of the case must be taken into consideration.

Defendant's citation to the minimum standards for indigent criminal appellate defense services, SCAO 2004-6, as well as the internal operating procedure for MCR 7.211(C)(5), are also inapplicable here, because, as pointed out by defendant himself, "defense counsel's pretrial failure to file an appellate brief in opposition to the prosecutor's application for leave to appeal to this Court will be treated as an omission committed by trial counsel rather than as a failure to represent the defendant as appellate counsel." *People v Johnson*, 144 Mich App 125, 132; 373 NW2d 263 (1985).

Reviewing this case under *Strickland, supra*, defendant is unable to meet his burden of overcoming the presumption that he was provided the effective assistance of counsel. Under *Strickland*, "[a] defendant that claims he has been denied the effective assistance of counsel must establish (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms ***and*** (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *Sabin, supra* at 659 (emphasis added).

Defendant has not established that defense counsel's performance fell below an objective standard of reasonableness. It is well settled that defense counsel is not ineffective for failing to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Here, this Court reversed the trial court's finding of a *Batson* violation because the record did not support a finding of purposeful discrimination. Even if defense counsel had answered the prosecution's appeal, his position would not have been successful. Therefore, he was not ineffective for failing to advocate that position.

Defendant has also not established that a reasonable probability exists that, but for counsel's failure to answer the prosecutor's appeal, the result of the proceedings would have been different. Even if defense counsel had filed a response to the prosecutor's interlocutory application for leave to appeal, the outcome of the appeal would not have changed. Therefore, reversal of defendant's conviction is not warranted.

Defendant next argues that the prosecutor engaged in misconduct when he made certain comments during rebuttal closing argument. Defendant did not object to the alleged instances of prosecutorial misconduct; therefore, this issue is unpreserved, and review is for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). As this Court has explained:

> The test for prosecutorial misconduct is whether [defendant] was denied a fair and impartial trial. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. The propriety of a prosecutor's remarks depends on all the facts of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. Appellate review of allegedly improper conduct is precluded if the defendant fails to timely and specifically object, unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002) [citations omitted].

It is well settled that a prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *Watson*, *supra* at 592. While the challenged comments suggested that defense counsel was trying to distract the jury from the truth, these comments must be considered in light of defense counsel's comments. *Id*. at 592-593. "'An otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument.'" *Id*. at 593, quoting *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

The main focus of defense counsel's closing argument was that the police failed to conduct a thorough investigation of the case once defendant became the primary suspect, the prosecution witnesses were not credible, and there was no physical evidence tying defendant to the crime. The challenged comments were made in rebuttal to defense counsel's closing argument. The prosecutor commented that defense counsel did not have any evidence to support his assertion that the police failed to adequately investigate alibi witnesses. The prosecutor also commented that defense counsel's assertion that a witness had procured a sentence reduction was not true. Indeed, the trial court sustained the prosecutor's objection to defense counsel's assertion to that effect. The prosecutor also commented that defense counsel's attack on the credibility of the witnesses was a mischaracterization of the facts, and that it was up to the jury to decide the facts of the case. It was not improper for the prosecutor to respond to defense counsel's closing argument by clarifying various points and reminding the jury that their duty was to decide the facts of the case based on all of the evidence presented.

"[A] prosecutor is not required to state his arguments in the blandest possible terms and may argue that a defendant's story is unworthy of belief as long as such argument is based on the evidence rather than on matters not of record or the prestige of the prosecutor's office." *People v Pawelczak*, 125 Mich App 231, 238; 336 NW2d 453 (1983). Further, this Court has indicated that argument suggesting that defense counsel was intentionally trying to mislead the jury is improper where the prosecutor "chastis[es] defense counsel and defendant's entire defense," but is not improper where the prosecutor takes issue with specific parts of the defense, as was the case here. *People v Dalessandro*, 165 Mich App 569, 579-580; 419 NW2d 609 (1988). Considering the prosecutor's remarks in context, defendant received a fair and impartial trial

where the remarks were made in response to defense counsel's closing argument. *Watson, supra* at 586, 592-593.

To the extent defendant argues that defense counsel was ineffective for failing to object to the allegedly improper comments, defense counsel is not effective for failing to make a futile objection. *People v Hill*, 257 Mich App 126, 152 n 15; 667 NW2d 78 (2003). Defendant has failed to demonstrate plain error. Accordingly, reversal is not warranted.

Defendant next argues that the trial court erred in assessing attorney fees without considering his ability to pay and by including these fees as part of the judgment of sentence. We agree.

"By the laws of Michigan and the Constitution of the United States, an indigent accused of a crime has a right to be provided counsel at public expense to assist in his defense." *Jensen v Menominee Circuit Judge*, 382 Mich 535, 540; 170 NW2d 836 (1969); MCR 6.104(E)(2)(d) and (E)(3). A defendant may be required to reimburse the county for the cost of his court-appointed attorney. *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004). However, as this Court has explained, before ordering a defendant to reimburse the county for these costs, the trial court

> need[s] to provide some indication of consideration [regarding a defendant's ability to pay], such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay. See *People v Grant*, 455 Mich 221, 242, 243 n 30; 565 NW2d 389 (1997). The amount ordered to be reimbursed for court-appointed attorney fees should bear a relation to the defendant's *foreseeable* ability to pay. A defendant's apparent inability to pay at the time of sentencing is not necessarily indicative of the propriety of requiring reimbursement because a defendant's capacity for future earnings may also be considered. [*Id*. at 254-255.]

Here, there is nothing in the record to indicate that the trial court considered defendant's ability to pay: the trial court simply stated the amount due. Further, "repayment may not be imposed as part of the sentence"; it must be provided for in a separate order. *Id*. at 255-256, n 15.

We affirm defendant's convictions, but vacate the portion of defendant's judgment of sentence requiring him to pay $1,307 for his court-appointed attorney, and remand for the trial court to reconsider its reimbursement order in light of defendant's current and future financial circumstances. An evidentiary hearing is not required on remand, and the trial court may obtain updated financial information from the probation department. *Id*. at 255 n 14. "If, in its discretion, the trial court determines that reimbursement is appropriate, it should establish the terms pursuant to which repayment is required in a separate order." *Id*. at 256. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen